IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

In re WALLACE G. WILKINSON, Debtor,	No. 01-50281 Chapter 11 E.D. Kentucky, Lexington Div. Chief Judge William S. Howard
In re WALLACE&S BOOKSTORES, INC., Debtor.	No. 01-50545 Chapter 11 E.D. Kentucky, Lexington Div. Chief Judge William S. Howard
In re FINIS.COM, INC., Debtor.	No. 01-51800 Chapter 7 E.D. Kentucky, Lexington Div. Judge Joseph M. Scott, Jr.
COSTA GEORGE REGAS; L. JEFFERY HAGOOD; DONALD B. DICKEY; DONALD BREWER; KIRK A. HUDDLESTON; HERMAN GETTELFINGER; TRACY THOMPSON; NICK CAZANA; LARRY D. GRAVES; CHRIS GETTELFINGER; ROBERT PEDDLE; FRED R. LANGLEY; GANELLE O. ROBERTS; TYLER THOMPSON; NICHOLAS A. LIAKONIS; MARK S. HAHN; JOSEPH R. ZAPPA, JR.; JOSEPH CONSTRUCTION CO., INC.; ZAPPA HARNESS PARTNERSHIP; FOOTHILLS PARKWAY ASSOCIATES; and THOMAS HAHN, Plaintiffs, vs. I. LORRAINE THOMAS, personal representative of the Estate	Adv. Pro. No. 01-3132

of R. David Thomas; JAMES McGLOTHLIN; UNITED COMPANY; McGLOTHLIN FOUNDATION; L.D. GORMAN; ELMER WHITAKER; RONALD V. JOYCE; GEORGE VALASSIS; and FROST BROWN TODD, LLC,

Defendants.

M E M O R A N D U M

APPEARANCES:

CHARLES A. WAGNER III, ESQ.
MARTIN B. BAILEY, ESQ.
WAGNER, MYERS & SANGER, P.C.
1801 First Tennessee Plaza
Knoxville, Tennessee 37929
Attorneys for Plaintiffs

JOHN W. BUTLER, ESQ.
BUTLER, VINES & BABB, PLLC
Post Office Box 2649
Knoxville, Tennessee 37901-2649
Attorneys for L.D. Gorman

SAMUEL D. HINKLE IV, ESQ.
STOLL, KEENON & PARK, LLP
2650 Aegon Center
400 West Market Street
Louisville, Kentucky 40202-3377
Attorneys for James W. McGlothlin, The United Company and The McGlothlin Foundation

WILLIAM L. MONTAGUE, ESQ.
LAURA DAY DELCOTTO, ESQ.
STOLL, KEENON & PARK, LLP
300 West Vine Street, Suite 2100
Lexington, Kentucky 40407-1801
Attorneys for Elmer Whitaker

KEVIN B. BYRD, ESQ.
JONES, DAY, REAVIS & POGUE
51 Louisiana Avenue, N.W.
Washington, District of Columbia 20001-2113
Attorneys for Ronald V. Joyce

ANDREW L. COLOCOTRONIS, ESQ.
BAKER, DONELSON, BEARMAN & CALDWELL
2200 Riverview Tower
900 South Gay Street
Knoxville, Tennessee 38018
Attorneys for Ronald V. Joyce,
James W. McGlothlin, The United Company,
The McGlothlin Foundation and Elmer Whitaker

MELINDA MEADOR, ESQ.
E. BRUCE FOSTER, JR., ESQ.
BASS, BERRY & SIMS PLC
Post Office Box 1509
Knoxville, Tennessee 37901-1509

-and-

MICHAEL L. DAGLEY, ESQ.
GENE L. HUMPHREYS, ESQ.
BASS, BERRY & SIMS PLC
315 Deaderick Street, Suite 2700
Nashville, Tennessee 37238
Attorneys for Frost Todd Brown LLC

MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE

This adversary proceeding is presently before the court on a motion filed by defendants James McGlothlin, The United Company, The McGlothlin Foundation, Elmer Whitaker, and Ronald V. Joyce ("Movants"), pursuant to Fed. R. Bankr. P. 9023 and 9024, to alter, amend and reconsider, and for relief from this

court's May 29, 2002 order granting plaintiffs' motion to abstain and thereby rendering moot Movants' motion to transfer venue. For the reasons discussed below, the motion to alter, amend and reconsider, and for relief will be denied. Resolution of this motion is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A).

I.

As set forth in this court's May 29, 2002 memorandum opinion, the plaintiffs allege in this lawsuit that the defendants and an individual named Wallace Wilkinson fraudulently conspired to induce plaintiffs to invest in an internet college bookstore known as *e*campus.com. This action was originally commenced in the Circuit Court for Knox County, Tennessee on August 3, 2001, after Mr. Wilkinson, *e*CAMPUS.com, Inc. (n/k/a Finis.com, Inc.), and 62 other entities connected to Mr. Wilkinson, including Wallace Bookstores, Inc., filed for bankruptcy relief. These bankruptcy cases are now pending in the bankruptcy court for the Eastern District of Kentucky at Lexington. The plaintiffs' lawsuit was removed to this court by some of the defendants on September 7, 2001, pursuant to 28 U.S.C. § 1452. Shortly after the removal, the Movants filed a motion to transfer venue of this adversary proceeding to the

bankruptcy court for the Eastern District of Kentucky. The plaintiffs responded to the motion by moving for remand and/or abstention, contending that removal was improper because this court lacked jurisdiction or, in the alternative, that the court should abstain from hearing this action. In a memorandum opinion and order entered May 29, 2002, this court concluded that although this was a noncore matter, the court had jurisdiction because this adversary proceeding was "related to" the pending bankruptcy cases. The court found, however, that mandatory abstention was required under 28 U.S.C. § 1334(c)(2). The May 29 order accordingly granted the plaintiffs' abstention request and denied Movants' venue motion.

On June 7, 2002, the Movants filed the motion to alter, amend and reconsider, and for relief from the May 29 order which is presently before the court. The basis of the motion is that the court erred in considering plaintiffs' motion for mandatory abstention prior to Movants' transfer of venue motion. The Movants also contend that the court erred in granting the plaintiffs' abstention request and that to the contrary their venue request should have been granted first, thereby allowing the so-called "home" bankruptcy court to consider the abstention issue. Lastly, the Movants note that Martha Wilkinson, Mr. Wilkinson's wife, filed a voluntary chapter 11 petition on May

16, 2002, after oral arguments in this case and that her bankruptcy case is now pending before the bankruptcy court for the Eastern District of Kentucky.

II.

Federal Rule of Bankruptcy Procedure 9023 states that "Rule 59 F. R. Civ. P. applies in [bankruptcy] cases ...." Rule 59 addresses the grounds and procedure for new trials and amendment of judgments, with subpart (e)[1] setting forth the time requirement for a motion to alter or amend judgment. According to the Sixth Circuit Court of Appeals, "[m]otions under Rule 59(e) must either clearly establish a manifest error of law or must present newly discovered evidence." *Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, 146 F.3d 367, 374 (6th Cir. 1998). *See also Melton v. Melton (In re Melton),* 238 B.R. 686, 693 (Bankr. N.D. Ohio 1999)("[A] Motion to Alter or Amend is an appropriate method by which a party may seek to abrogate a judgment entered by a Court, which is predicated on a factual error."). Nonetheless, "[a] motion under Rule 59(e) is not an

[1]"A motion to alter or amend the judgment shall be filed not later than 10 days after entry of the judgment." Fed. R. Civ. P. 59(e).

opportunity to re-argue a case." *Engler*, 146 F.3d at 374.

Rule 9024 of the Federal Rule of Bankruptcy Procedure adopts Fed. R. Civ. P. 60 for bankruptcy proceedings. Rule 60 lists various grounds for relieving a party from a final judgment or order including "mistake, inadvertence, surprise, or excusable neglect." Fed. R. Civ. P. 60(b)(1). "A claim of strictly legal error falls in the category of 'mistake' under Rule 60(b)(1)...." *Cincinnati Ins. Co. v. Byers,* 151 F.3d 574, 578 (6th Cir. 1998).

III.

As noted, the Movants contend that this court erred in ruling on the abstention issue, that as a mere "conduit" court, this court should have transferred this proceeding to its "home" court, *i.e.*, the district where the bankruptcy cases are pending, and permitted that court to resolve the abstention and remand questions. This court recognized in its memorandum opinion that there was a split of authority on the subject, but concluded that the better reasoned approach was for this court to determine "whether any bankruptcy court should hear a proceeding before it determines which bankruptcy court should hear it." Memorandum opinion at p. 12 (quoting *Lone Star Indus., Inc. v. Liberty Mut. Ins.*, 131 B.R. 269, 273 (D. Del.

1991)).

Notwithstanding Movants' reference to three decisions on this issue which were not cited in this court's opinion (or in any of the previous memoranda of law filed by Movants when this issue was first considered), this court is not persuaded that it acted erroneously by resolving the abstention and remand issues rather than deferring to the so-called "home" court. The proper role of the conduit court was considered recently by the bankruptcy court in *AG Industries, Inc. v. AK Steel Corp. (In re AG Industries, Inc.*), 279 B.R. 534 (Bankr. S.D. Ohio 2002). That court noted that under the conduit court theory:

> [T]he local bankruptcy court does little more than determine the initial jurisdictional issue and whether the removal notice is properly and timely filed. [Citation omitted.] If properly filed and jurisdiction is established under § 1334, the local bankruptcy court transfers the state court matter to the home bankruptcy court under the change of venue statute (28 U.S.C. § 1412), and allows the home bankruptcy court to make the final decision whether to keep or remand the matter to state court.

Id. at 540.

The *AG Industries* court rejected this "very limited role in the decision-making," stating:

> Although the conduit approach has support, this court believes that the language of 28 U.S.C. § 1452(b) and § 1412 suggest a more active role for the local bankruptcy court. Under 28 U.S.C. § 1412, the transfer of a case from a local bankruptcy court to a home bankruptcy court is discretionary rather than

> mandatory or automatic. *See Harnischfeger*, 246 B.R. at 436 n.42 (noting the use of the word "may" in the statute). Furthermore, the provision governing the remand of actions removed to federal court states that "[t]he court to which a claim or cause of action is removed" is the court that should determine whether to remand the matter to state court based on equitable grounds. 28 U.S.C. § 1452(b). Thus, the language of both § 1412 and § 1452(b) support that this court has the responsibility to make the decision of whether to transfer the case to the home bankruptcy court or remand the matter to state court.

Id. This court agrees with this analysis and thus will deny Movants' motion to alter, amend and reconsider, and for relief in this regard.

With regard to the court's ruling on the abstention issue, this court noted in its memorandum opinion that the requirements for mandatory abstention were set forth by the Sixth Circuit Court of Appeals in *Dow Corning* wherein the court stated:

> [F]or mandatory abstention to apply to a particular proceeding, there must be a timely motion by a party to that proceeding, and the proceeding must: (1) be based on a state law claim or cause of action; (2) lack a federal jurisdictional basis absent the bankruptcy; (3) be commenced in a state forum of appropriate jurisdiction; (4) be capable of timely adjudication; and (5) be a non-core proceeding.

Lindsey v. Dow Chemical Co. (In re Dow Corning Corp.), 113 F.3d 565, 569 (6th Cir. 1997). The Movants agree with the court's conclusion that factor one is present because plaintiffs have alleged state securities law and state common law fraud causes of action. The Movants contend, however, that the court erred

in concluding that factors two through five exist in this proceeding.

With respect to factor number two, which requires that there be no federal jurisdictional basis absent the bankruptcy, the Movants assert that in addition to the state securities law claims, the plaintiffs could have alleged violations of federal securities law, thereby establishing federal jurisdiction based on a federal question. Therefore, according to the Movants, "[p]laintiffs' failure to plead their federal causes of action is not determinative of whether any federal court lacks jurisdiction," citing the Sixth Circuit Court of Appeals decision in *Robinson v. Michigan Consolidated Gas Co. Inc.*, 918 F.2d 579 (6th Cir. 1990), as well as three other cases: *Baccus v. Parrish*, 45 F.3d 958 (5th Cir. 1995) "(Court looked beyond face of complaint and held that case was removable although complaint purported to involve only questions of state law.)"; *Uncle Ben's International Division of Uncle Ben's Inc. v. Hapag-Lloyd Aktiengesellschaft*, 855 F.2d 215, 217 (5th Cir. 1988) "(Notwithstanding artful pleading which made no reference to federal law, action could have been brought originally in federal court.)"; and *Monroe v. Cuna Mutual Insurance Society*, 1999 WL 1078702 (W.D. Tenn. 1999) "(Mere failure to make specific reference in a complaint to a federal statute or other

source of federal law is not enough to prevent removal.)".

Before addressing these cases, this court notes that the United States Supreme Court recently reiterated that "federal jurisdiction generally exists 'only when a federal question is presented on the face of the plaintiff's properly pleaded complaint.'" *Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, 122 S. Ct. 1889 (2002) (quoting *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987)). The Supreme Court stated in the *Caterpillar* decision that this rule, known as the well-pleaded complaint rule, "makes the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law." *Caterpillar*, 482 U.S. at 392. *See also Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804, 809 n.6 (1986) ("Jurisdiction may not be sustained on a theory that the plaintiff has not advanced."). Also, as observed recently by the Sixth Circuit Court of Appeals, "a case arises under federal law ... when it is apparent from the face of the plaintiff's complaint either that the plaintiff's cause of action was created by federal law, ... or if the plaintiff's claim is based on state law, a substantial, disputed question of federal law is a necessary element of the state cause of action." *Mich. So. R.R. Co. v. Branch & St. Joseph Counties Rail Users Assoc., Inc.*, 287 F.3d 568, 573 (6th Cir. 2002). In

the present case, plaintiffs' claims are based solely on state law and there is no allegation, much less any indication, that any federal law question is involved in plaintiffs' state law claims.

The cases cited by Movants in support of their assertion that federal jurisdiction exists even though plaintiffs' complaint is grounded solely in state law are distinguishable from the instant action. In *Uncle Ben's,* federal jurisdiction was provided by the fact that a substantial question of federal law was a necessary element of the plaintiff's state law claim. *See Uncle Ben's,* 855 F.2d at 217. *Baccus*, although premised on state law, involved a collateral attack on a settlement agreement in a federal case. *Baccus,* 45 F.3d at 960. The court in *Monroe* concluded that federal jurisdiction existed notwithstanding the complaint's failure to reference a federal statute or other source of federal law because the plaintiffs had all filed bankruptcy and their causes of action were property of their bankruptcy estate over which the federal district court had exclusive jurisdiction under 28 U.S.C. § 1334(c). *Monroe*, 1999 WL 1078702, at *5.

Similarly, the Sixth Circuit's opinion in *Robinson* is predicated on facts which are not present in this case. At issue in *Robinson* was whether a bankruptcy court should have

abstained from hearing a state court action against a bankruptcy trustee which had been removed to federal court. *Robinson*, 918 F.2d at 583. In light of the well-pleaded complaint rule, the court found no jurisdiction under 28 U.S.C. § 1331, the general federal question statute, because the claims set forth in the plaintiffs' complaint were all based wholly on state law. *Id.* at 586. On the other hand, the Sixth Circuit did conclude that an independent basis for federal subject matter jurisdiction was provided by 28 U.S.C. § 959(a). Under this provision, actions against bankruptcy trustees arising out of their management of estate property may be brought in the appointing federal court because such suits are ancillary to the court's general jurisdiction over estate property. *Id*. Because the instant action does not involve any such claim against a bankruptcy trustee, 28 U.S.C. § 959(a) provides Movants no independent basis for federal jurisdiction. And, rather than supporting Movants' motion to reconsider, *Robinson* validates this court's application of the well-pleaded complaint rule.

Although not argued by the Movants, the court does note that the Supreme Court has developed an exception to the well-pleaded complaint rule. *Peters v. Lincoln Elec. Co.*, 285 F.3d 456, 468 n.11 (6th Cir. 2002)(citing *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63-64 (1987)). "If Congress intends that

a federal statute 'completely preempt' an area of state law, any complaint alleging claims under that area of state law is presumed to allege a claim arising under federal law." *Id.* "The complaint ... will be treated as alleging a federal cause of action, notwithstanding that on its face, the plaintiff's complaint alleges only a state-law cause of action." *Id.*

> "Complete preemption" applies only in the extraordinary circumstance when Congress intends, not merely to preempt a certain amount of state law, but also to transfer jurisdiction to decide the preemption question from state to federal courts. *See Metropolitan Life,* supra, 481 U.S. at 65-66, 107 S. Ct. 1542 (finding a statement of such intent in the legislative history of ERISA). Without evidence of Congress's intent to transfer jurisdiction to federal courts, there is no basis for invoking federal judicial power.

Id.

There is no indication in this proceeding that this exception is applicable to provide an independent basis of federal jurisdiction. No authority has concluded, and this court finds no basis for concluding, that Congress intended to preempt state securities law or to transfer jurisdiction over all securities law violations to the federal courts.[2] Based on

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[2]In *Robinson*, the Sixth Circuit observed that the scope of complete preemption as recognized by the Supreme Court is extremely limited, existing only where a claim is preempted by section 301 of the Labor Management Relations Act of 1947, where a state law complaint alleges a present right to possession of (continued...)

all of the foregoing, this court concludes that it did not err in previously concluding that this action lacks a federal jurisdictional basis independently of 28 U.S.C. § 1334.

In their motion to reconsider, the Movants also assert that this court erred in finding that the third required element for mandatory abstention existed: that this proceeding was commenced in a state forum of appropriate jurisdiction. As they argued initially, Movants assert that the Knox County, Tennessee circuit court where this action was first commenced lacks personal jurisdiction over several of the defendants and that this is one of the bases for their pending motions to dismiss. In its memorandum opinion, this court observed that "the existence of this action in the state court is prima facie evidence that a state court of competent jurisdiction exists," quoting *Gonzales Construction Co. v. Fulfer (In re Fulfer)*, 159 B.R. 921, 923 (Bankr. D. Idaho 1993); and concluded that "[a]ny personal jurisdiction defenses are best resolved by the Tennessee state court." The Movants contend that this was error because "personal jurisdiction is a requirement for mandatory abstention" and that "unless and until the jurisdiction motions

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[2](...continued)
Indian tribal lands, and where state tort or contract claims are preempted by sections 502(a)(1)(B) and 502(f) of the Employee Retirement Income Security Act of 1974. *Robinson*, 918 F.2d at 585.

are ruled upon," the plaintiffs cannot meet their burden of proving that an action is commenced in a state forum of appropriate jurisdiction.

This court disagrees. The Movants' argument might be valid if this action had originally been commenced in federal court and the defendants in the action were seeking abstention, such that the possible absence of jurisdiction in state court would result in the plaintiffs' inability to pursue their cause of action against the defendants if abstention were granted. If those were the facts of the instant case, this court would require the party requesting abstention to clearly establish both personal and subject matter jurisdiction. In this case, however, it is the plaintiffs who seek abstention and thus the plaintiffs who risk having their lawsuit dismissed in state court if jurisdiction does not lie therein. Under these circumstances, this court agrees with the holding in *Fulfer* that a prima facie existence of jurisdiction has been established for abstention purposes. If the state court ultimately determines that personal jurisdiction is lacking as the Movants charge, such a determination would only inure to the Movants' benefit.

The Movants also contend that the court erred in concluding that the fourth requirement for abstention under § 1334(c)(2) had been established, that this proceeding is capable of timely

adjudication in state court. This court considered that factor by focusing on whether allowing the case to proceed in state court would adversely affect the administration of the bankruptcy cases and found no such adverse effect in light of the liquidation nature of all three bankruptcy cases. The Movants maintain that "[t]he Opinion fails to provide any analysis of how Plaintiffs proved that there is no 'unfavorable effect' on the three bankruptcy cases" and that the court failed to consider any criteria other than the status of the bankruptcies as liquidations. The Movants also assert that timely adjudication is legally impossible without the debtors because Movants' liability to plaintiffs, if any, is only derivative of debtors' liability. This court finds none of these assertions persuasive.

Although it is true that various courts have looked at numerous factors in evaluating "timely adjudication," it has been recognized as this court noted that the reorganization versus liquidation nature of the underlying bankruptcy case is the most important consideration. *See Personette v. Kennedy (In re Midgard)*, 204 B.R. 764, 771 (B.A.P. 9th Cir. 1997). *See also Caperton v. A.T. Massey Coal Co.*, 270 B.R. 654, 656 (S.D. W. Va. 2001)(citing *Midgard* with approval). Furthermore, the other factors which *Midgard* and other courts have considered in

evaluating timely adjudication weigh in favor of abstention when applied to the instant case. These factors include the fact that a jury demand had been made but the parties have not consented to entry of final orders and judgment by the bankruptcy court as required by 28 U.S.C. § 157(e) for noncore matters. Thus, even if this action remains in the federal system, it would not be tried by a bankruptcy judge but would have to be transferred to the district court. Under similar facts, Judge Stair in the *Best Reception Systems* decision concluded the lawsuits before him could be timely adjudicated in state court, citing the federal district court's heavy civil and criminal caseload and its obligation to give precedence to criminal actions. *See Beneficial Nat'l Bank USA v. Best Receptions Sys, Inc. (In re Best Reception Sys., Inc.)*, 220 B.R. 932, 952 n.31 (Bankr. E.D. Tenn. 1998). While the Movants are correct that in some reported decisions, the courts have required the party requesting abstention to present evidence as to the relative dockets of the state and federal courts in order to properly evaluate "timely adjudication," such a comparison would be difficult if not impossible in the present proceeding as the plaintiffs observe since it is unknown which federal district judge would ultimately hear the matter. Furthermore, one court has noted that "[w]hile an affirmative showing of the

possibility of timely adjudication in state court may be necessary where a movant seeks abstention from a proceeding originating in federal court, such a showing is not necessary where the movant is contesting the removal of his own state action." *Abadie v. Poppin*, 154 B.R. 86, 89 (N.D. Cal. 1993). And, finally, regarding Movants' assertion that adjudication in state court is impossible due to the absence of the debtors, again, this is a defense which the Movants should raise in state court.

The Movants' last contention in the motion to alter, amend and reconsider, and for relief is that this court erred in ordering abstention because this is a core rather than a noncore proceeding. This argument was raised and fully considered when first presented to the court. In this court's view, its ruling was correct and the court sees no reason to revisit the issue.

The only other matter raised by the Movants is the recent bankruptcy filing by Wallace Wilkinson's wife, Martha Wilkinson. Because Mrs. Wilkinson is not a defendant in this action, her bankruptcy filing appears to be irrelevant to the action at hand. Accordingly, it provides no basis for this court to alter or amend its previous rulings.

IV.

In accordance with the foregoing, an order will be entered contemporaneously with the filing of this memorandum opinion denying the motion alter, amend and reconsider, and for relief from this court's May 29, 2002 order.

FILED: July 26, 2002

BY THE COURT

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MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE